

HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting)

(Chapter VIII Rule 32 (2)(b))

Description of the case.

W.P. 976 of 2003 (SS)

Smt. Shanti Harbola & others vs. Chief Medical Officer & another

Approved for reporting.

~~Not approved for reporting~~

Date of decision. 7.11.2003

Initial of Judge

HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition No.976 of 2003(SS)

Smt. Shanti Harbola & others Petitioners
Versus
Chief Medical Officer, Bageshwar & others Respondents

Writ Petition No.1233 of 2003 (SS)

Km. Ganga Arya Petitioners
Versus
Director General, Medical Health &
Family Welfare, Uttaranchal & another Respondents

Writ Petition No.1231 of 2003 (SS)

Smt. Balsamma & another Petitioners
Versus
Director General, Medical Health & another Respondents

Writ Petition No.860 of 2003 (SS)

Smt, Khasti Bajeli Petitioners
Versus
Chief Medical Officer, Bageshwar & others Respondents

Writ Petition No.1143 of 2003 (SS)

Smt. Kamla Verma Petitioners

Versus

Chief Medical Officer, Bageshwar & others Respondents

Writ Petition No. 1262 of 2003 (SS)

Smt. S.G. Singh Petitioners

Versus

Director General, Medical Health & another Respondents

Writ Petition No.1221 of 2003 (SS)

Smt. Manju Joshi Petitioners

Versus

Director General, Medical Health & another Respondents

Sri. Sharad Sharma, Sri Manoj Tiwari, Sri Ganesh Kandpal,
Sri P.S. Adhikari, Sri S.C. Bhatt for the petitioners.
Standing Counsel for the Respondents.

Dated:-7.11.2003

Hon'ble Rajesh Tandon, J.

Heard the learned counsel for the parties.

By the present writ petitions the petitioners have prayed for the issue of a writ, order or direction in the nature of certiorari quashing the order dated 6.8.2003 passed by respondent the Chief Medical Officer, Bageshwar, Uttaranchal.

Briefly stated, the facts giving rise to the present writ petitions are that the petitioners are Basic Health Workers(Woman) posted at various places in District Bageshwar. The services of the Basic Health Workers are governed by the U.P. Chikitsa Swasth Evam Parivar Kalyan Vibhag Swasth Karyakarta Aur Swasth Paryvekshak (Purush Evam Mahila Sewa Niyamavali 1997) (hereinafter called the Rules).

Clause 4 of Sub Rule 5 of above rule provides that those Health Workers, who have put in 10 years service and have successfully completed six months training, shall be eligible for promotion. A proviso has been appended to this Sub rule (4) of Rule 5, which provides that in case the trained Health Workers are not available to be considered for promotion, untrained Health Workers who have put in 10 years of service may be considered.

The respondents prepared a seniority list and as per the circular dated 26.4.2003 for the promotion of Basic Health Workers. The petitioners alleged that the said seniority list has not been prepared according to rules and there are several discrepancies and date of appointment of various petitioners have wrongly been shown. Both

the parties have submitted that admittedly there were only eight trained Health Workers who were eligibly under sub clause (4) of Rule 5. Rest of the Health Workers were also included for consideration for promotion in view of proviso of Sub Clause (4) of Rule 5.

According to the petitioners there were 11 vacancies of Health Supervisors (Female). It has been stated by the petitioners that the respondents have given training to the following Basic Health workers.

1. Mrs. Kamalesh Joshi, at serial no.5.
2. Khasti Devi at Serial No.6,
3. Smt. Khasti Bajeli at Sl. No. 10.
4. Shanti Hareriya , at Sl. No.11
5. Km. Ganga Arya at Sl. No.13
6. Shanti Harbola at Sl. No.17.
7. Bhagirathi Bandari at Sl. No.18.

It has been alleged by the petitioners that training has been given to the junior candidates ignoring senior candidates.

The selection committee has considered promotion of 11 Basic Health Workers on the post of Health Supervisor vide order dated 6.8.2003. The said promotion order has been cancelled by the

respondent no. 2 on 25.9.2003, without affording any opportunity to the petitioners and without assigning any reasons.

A perusal of the order dated 25.9.2003 shows that order of appointment has been cancelled in a cryptic manner without affording any opportunity to the persons effected by that order and it was done on the alleged opinion by D.G.C. (Civil), Bageshwar. The cancellation order is reproduced as under:

इस कार्यालय के आदेश संख्या 99/2003 दिनांक 6.8.2003 द्वारा स्वास्थ्य कार्यकर्ता महिला की पदोन्नति स्वास्थ्य पर्यवेक्षक महिला के पद पर की गई थी को जिला शासकीय अधिवक्ता सिविल बागेश्वर की विधिक रायच पर तत्काल प्रभाव से पदोन्नति आदेश निरस्त किये जाते हैं ।

पदोन्नति किये गये कार्मिको को तत्काल प्रभाव से अपने मूल पर एवं तैनाती के स्थान पर कार्यभार ग्रहण करने की लिए निर्देशित कर दिया जाय ।

On 10.10.2003 time was granted to the Standing Counsel to seek instructions and to file counter affidavit but no counter affidavit has been filed on behalf of the respondents.

The aforesaid order shows that all the promotions made vide order dated 6.8.2003 were cancelled and entire promotion list has been set aside.

It has been argued that there were 11 vacancies for promotion in District Bageshwar and there were only eight trained Basic Health Workers and as such there was a short fall of 3 candidates. Therefore, untrained Health Workers (Female) came under the zone of

consideration for promotion. The learned counsel pointed out that promotions have to be made according to Uttar Pradesh Chikitsa Swasth Evam Parivar Kalyan Vibhag Swasth Karyakarta Aur Swasth Paryvekshak (Purush Evam Mahila) Sewa Niyamawali 1997. Rule 5 of said regulations provides as under:

5. सेवा में विभिन्न श्रेणियों के पदों पर भर्ती निम्नलिखित स्रोतों से की जायेगी

- | | |
|-------------------------------|------------------------|
| 1. स्वास्थ्य कार्यकर्ता पुरुष | आयोग के माध्यम से सीधी |
| 2. स्वास्थ्य कार्यकर्ता महिला | भर्ती द्वारा |

.....

चार— स्वास्थ्य प्रवेक्षक महिला — मौलिक रूप से नियुक्त स्वास्थ्य कार्यकर्ताओं महिला में से जिन्होंने भर्ती के वर्ष के प्रथम दिवस को इस रूप में दस वर्ष की सेवा पूरी कर ली हो और सरकार द्वारा विहित स्वास्थ्य पर्यवेक्षक महिला का छः मास का प्रशिक्षण सफलता पूर्वक पूरा कर लिया हो चयन समिति के माध्यम से पदोन्नति द्वारा,

परन्तु यदि पर्याप्त संख्या में प्रशिक्षित स्वास्थ्य कार्यकर्ता महिला पदोन्नति के लिए उपलब्ध न हो तो मौलिक रूप से नियुक्त ऐसी अप्रशिक्षित महिला को जिन्होंने भर्ती के वर्ष के प्रथम दिवस को इस रूप में दस वर्ष की सेवा पूरी कर ली हो सम्मिलित करने के लिए पात्रता के क्षेत्र का विस्तार किया जा सकता है ऐसी पदोन्नति महिला स्वास्थ्य पर्यवेक्षक महिला के पद पर अपनी पदोन्नति के तुरन्त बाद सेवा काल प्रशिक्षण प्राप्त करेगी।

A perusal of above rule shows that if trained candidates are not available selection for promotion has to be made from untrained candidates.

Learned counsel for the petitioners submitted that Rule 16(1) of Uttar Pradesh Chikitsa Swasth Evam Parivar Kalyan Vibhag Swasth Karyakarta Aur Swasth Paryvekshak (Purush Evam Mahila) Sewa

Niyamawali 1997, provides that unfit candidates shall be eliminated while making promotions on the basis of seniority. Therefore, suitability cum seniority is the criteria for promotion.

Hon'ble Mr. Justice P.C. Verma on 23.8.2003 has passed the following order in Writ Petition No.860 of 2003 (SS):

“Sri Naithani, learned Senior Advocate submitted that rule eligibility for promotion provided under rule 16 of the U.P. Chikitsa Swasth Evam Parivar Kalyan Vibhag Swasth Karyakarta Aur Swasth Paryveshak (Purush Evam Mahila) Sewa Niyamawali 1997 is that the trained Supervisors shall be promoted to the posts of Health Superintendents. A Proviso has been appended to the said rule which provides that if the trained supervisors are not available, the untrained Supervisors may be considered for promotion. He submits tat ignoring the petitioner who is a trained Supervisor, the untrained Supervisors have been promoted.

It is settled law that the proviso is exception to the main section and it cannot over ride the main section. By promoting the untrained Supervisors the proviso has been given over riding effect over the main clause, which is not permissible and is illegal. According to the promotion of the untrained Supervisors, if any, is made ignoring the suitable trained Supervisors, that promotion order shall not be given effect to.”

Thereafter by another order dated 11.9.2003 passed in W.P. No.976 (SS) of 2003 and W.P. No.860 (SS) of 2003, directions have been given by his Lordship to the following effect:

“In the recruitment year there were 11 vacancies available to be filled up by promotion. According to rules known as the Uttar Pradesh Promotion by Selections (On posts Outside purview of the Public Service Commission) Eligibility List Rules, 1986, an eligibility list is to be prepared for promotion. Sub rule (1) of Rule 5 of the said Rules provides for preparation of eligibility list where the criteria is seniority subject to the rejection of unfit, which reads as under:

5. Preparation of eligibility list where the criterion is seniority subject to the rejection of unfit:

(1) Where the criterion for promotion is seniority subject to the rejection of unfit the appointing authority shall prepare three lists to be called the eligibility lists, of the senior-most eligible candidates from each of the category namely, General, Scheduled Caste and Schedule Tribes, separately in the light of vacancies available for each of the aid category containing names so far as may be in the following proportion:

*For 1 to 5 vacancies.. 2 times the number of vacancies
subject to a minimum of 5.*

*For over 5 vacancies.. 1-1/2 times the number of vacancies
subject to a minimum of 10”*

*As there were 11 vacancies in the said recruitment year, according to the aforesaid Rules 17 candidates were to be considered for promotion according to the seniority list. The promotion is to be made according to Rule 5 of **U.P. Chikitsa Swasth Evam Parivar Kalyan Vibhag Swstth Karyakarta Aur Swasth Paryvekshak (Purush Evam Mahila) Sewa Niyamawali, 1997 (Amended Rules 1998)**. Clause 4 of Sub Rule 5 of the above Rules provides that those Health Workers, who have put in 10 years service and have successfully completed six months’ training, shall be eligible for promotion. A proviso has been appended to this Sub rule (4) of Rule 5, which provides that in case the trained Health Workers are not available to be considered for promotion, untrained Health Workers who have put in 10 years’ service may be considered. Admittedly, there were eight trained Health workers only who were eligible under main Sub clause (4) of Rule 5. Rest nine untrained Health Workers were also to be included in the Zone of consideration for being considered for promotion in view of the proviso appended to Sub Clause (4) of Rule 5. The learned counsel for the petitioners argued that untrained candidates have been promoted while the petitioners have not been promoted. If the untrained candidates would not have been*

considered, the petitioners trained Health Workers would have been promoted. The argument to the learned counsel for the petitioners is misconceived. It is settled law that a candidates cannot claim promotions a matter of right, only a right to be considered for promotion can be claimed. Here eight trained candidates including the petitioners and nine untrained candidates were considered for promotions the zone of consideration was of seventeen candidates. Therefore, there is no illegality in considering the candidature of the candidates under the proviso appended to clause (4) of Rule 5 of the aforesaid Rules. Therefore, the interim order dated 23.08.2003 passed in Writ Petition No. 860 (SS) of 2003 is vacated.

In case of the petitioners now hinges in the very narrow compass i.e. as to whether they have rightly been superseded or there is some illegality in their supersession?

A statement has been made in the writ petition that there is no adverse material on their service record therefore; the petitioners have wrongly been superseded. To ascertain the aforesaid fact, the learned Standing Counsel is granted three weeks time to file counter affidavit explaining as to why the petitioners have been superseded in the selection though they are trained one.

The promotion, which have been made after the impugned selection, shall be subject to further orders to be passed in the writ petition.”

There is no material on the record to suggest as to why the petitioners have been suspended. The order of selection passed by the Chief Medical Officer, Bageshwar has also not suggested any reason for selection of candidates for promotion.

The petitioners have referred judgment of the Apex Court in the case Gajanan L. Parnekar vs. State of Goa and another, AIR 1999 SC 3262. It has been held as under:

“The manner in which the order dated 21st 22nd January 1999 came to be made was to say the least, not proper. The appellant was denuded of the benefits of the order dated 16.2. 1994 unheard. There has been a breach of the principle of natural justice and a violation of fair play in action. The earlier order made in favour of the appellant as early as on 16.2.1994 was rescinded without giving any opportunity to the appellant to show cause against it. Absorption of the appellant as Headmaster of Government High School by the order-dated 16.2.1994 had not been put in issue through any proceedings by any party at any point of time. The benefit could not have been taken away from the appellant without affording him any opportunity of hearing.”

Similar view has been taken by the Division Bench of Allahabad High Court 1997 A.W.C. (supp.) 598. It has been held as under:

“The petitioner, has, however, not stated in the writ petition that he is eligible for promotion to the post of Assistant Superintendent, although it was one of the grounds on which his promotion was cancelled by the Director. But as the Tribunal has not rejected the claim petition of the petitioner on this ground, it is not proper to decide the writ petition on such a ground. Proper course appears to be to permit the Director to go into the matter and pass appropriate order.”

The Apex Court in the case of State of Orissa vs. Dr. Binapani Dei and others AIR 1967 SC 1269. The Apex Court has observed that the administrative orders which involve civil consequences have to be passed consistently with the rules of natural justice. The observations of the Apex Court are quoted below:

“An order by the State to the prejudice of a person in derogation of his vested rights may be made only in accordance with the basic rules of justice and fairplay. The deciding authority it is true, is not in the position of a Judge called upon to decide an action between contesting parties, and strict compliance with the forms of judicial procedure may not be insisted upon. He is, however, under a

duty to give an opportunity to set up his version or defence and an opportunity to correct or to controvert any evidence in the possession of the authority, which is sought to be relied upon to his prejudice. For that purpose the person against whom an enquiry is held must be informed of the case he is called upon to meet, and the evidence in support thereof. The rule that party to whose prejudice an order is intended to be passed is entitled to a hearing applies alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our constitutional set up that every citizen is protected against exercise of arbitrary authority by the State or its officers. Duty to act judicially would , therefore, arise from the very nature of the function intended to be performed: it need not be shown to be super-added. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case.”

The cancellation orders could not have been passed without affording opportunity of hearing to the petitioners as held by this

Court in Writ petition No.236 (SS) of 2000, Pooran Singh vs. State of Uttaranchal and others, relying upon the the Apex Court in Basudeo Tewari vs. Sido Kanhu University and others (1998) 8 S.C.C. 194 and Gajanan L. Parnekar vs. State of Goa and another (1998) 8 S.C.C. Hon'ble Mr. Justice P.C. Verma has held as under:

“It is not disputed that the cancellation orders has been passed without any notice or pay in lieu of notice as required in condition No.2 of the regularisation orders contained in annexure No.1, therefore, cancellation orders have been passed without affording any opportunity of hearing to the petitioners. As the regularisation orders were passed in implementation of the Scheme contained in Govt. order dated 15.10.1997 after due selection and the petitioners were regularised against the then existing posts, as such, the reason assigned for cancellation that posts have been reallocated by the Chief Engineer vide order dated 10.04.2000 is not acceptable.

* * * * *

On account of cancellation of regularisation, the petitioners have suffered civil consequences, therefore, the cancellation orders could not have been passed without affording opportunity of hearing to the petitioners as held by the Apex Court in Basudeo Tewary vs. Sido Kanhu University and others (1998) 8 S.C.C. 194. In Gajanan L.

Parnekar vs. State of Goa and another (1998) 8 S.C.C. the Apex court held that recall of order of absorption without giving notice or opportunity of hearing is violative of principles of natural justice.”

Suffice it to state that it is rule of natural justice that no one should be condemned unheard, as held by the Apex Court in the case *Smt. Maneka Gandhi vs. Union of India and another*, AIR 1978 SC 597, the Apex Court has observed as under:

“It is well established that even where there is no specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken against an individual, which affects the rights of that individual, the duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action.

“In England, the rule was thus expressed by Byles J. in Cooper vs. Wandsworth Boards of Works: (1863) 14 CB (NS) 180:

“The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence. Adam (says God), “where art thou? Hast

thou not eaten of the tree whereof I commanded the that thou shouldest not eat.” And the same question was put to Eve also.”

In the light of the observations made above, the respondents are directed to make fresh seniority list of Basic Health Workers and thereafter to undertake promotional exercise in accordance with Rule 5 (4) and 16 (1) of Uttar Pradesh Chikitsa Swasth Evam Parivar Kalyan Vibhag Swasth Karyakarta Aur Swasth Paryvekshak (Purush Evam Mahila) Sewa Niyamawali 1997, after giving opportunity of hearing to the petitioners.

The respondents are directed to maintain status quo regarding the candidates who have already been promoted by virtue of the order-dated 6.8.2003. Liberty is given to the respondents to finalise the promotion exercise within two months after receipt of the certified copy of this order, till then order dated 25.9.2003 shall remain in abeyance.

The writ petitions are disposed of accordingly. No order as to costs.

7.11.2003
Dhyani

(Rajesh Tandon, J.)